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7 TIMOTHY LEWIS JONES, T53643,
8 Plaintiff,
9 v.
10 M. SANDOVAL,
11 Defendant(s).

Case No. [19-cv-05981-CRB](#) (PR)

**ORDER GRANTING PLAINTIFF'S
MOTION TO VOLUNTARY DISMISS
WITHOUT PREJUDICE**

(ECF Nos. 18 & 22)

12 Plaintiff moves to voluntarily dismiss this action without prejudice following defendant's
13 motion for summary judgment on grounds that plaintiff failed to properly exhaust available
14 administrative remedies before filing suit, as required by 42 U.S.C. § 1997e(a). Plaintiff seeks
15 dismissal without prejudice so he can refile after properly exhausting under § 1997e(a).

16 It is well established that a plaintiff has the absolute right to dismiss without prejudice his
17 or her action by filing a notice of dismissal "at any time before service by the adverse party of an
18 answer or of a motion for summary judgment." Fed. R. Civ. P. 41(a)(1). But after service of an
19 answer or of a motion for summary judgment (and if no stipulation of dismissal is obtained), the
20 plaintiff must obtain court approval to dismiss and the court must consider whether the dismissal
21 should be with or without prejudice. See Fed. R. Civ P. 41(a)(2); Hamilton v. Firestone Tire &
Rubber Co., 679 F.2d 143, 145 (9th Cir. 1982).

23 Under the law of the circuit, a successful motion for summary judgment for failure to
24 properly exhaust available administrative remedies under § 1997e(a) results in a dismissal without
25 prejudice to refiling after properly exhausting. See Wyatt v. Terhune, 315 F.3d 1108, 1120 (9th
26 Cir. 2003) ("If the district court concludes that the prisoner has not exhausted nonjudicial
27 remedies, the proper remedy is dismissal of the claim without prejudice."), overruled on other
28 grounds by Albino v. Baca, 747 F.3d 1162 (9th Cir. 2014) (en banc). The voluntary dismissal

1 without prejudice plaintiff seeks here so he can refile after properly exhausting consequently
2 appears both just and proper. Plaintiff's motion (ECF No. 22) for voluntarily dismissal without
3 prejudice is GRANTED and the instant action is DISMISSED WITHOUT PREJUDICE.

4 The clerk is instructed to close the file and terminate all pending motions (see ECF No. 18)
5 as moot.

6 **IT IS SO ORDERED.**

7 Dated: July 23, 2020



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9 CHARLES R. BREYER
United States District Judge